Decision ________________

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of OSP Communications LLC and John Vogel, an individual, to determine whether OSP Communications LLC and John Vogel have violated the Laws, Rules and Regulations of this State in the Provision of Operator and Calling Card Services to California Consumers; and Whether The Billing Resource LLC, a Delaware Corporation, and The Billing Resource LLC d/b/a Integretel, a California Corporation should Refund and Disgorge All monies billed and collected on behalf of OSP Communications LLC.	Investigation 11-05-028 (Filed on May 26, 2011)

ORDER MODIFYING DECISION 16-03-012
AND DENYING RHEARING OF THE DECISION AS MODIFIED

I. INRODUCTION

This decision addresses the application for rehearing of Decision (D.) 16-03-012 filed by the Commission's Safety and Enforcement Division ("SED").[1] In D.16-03-012, we denied SED's motion for an Order to Show Cause ("OSC") on why we should not order The Billing Resource d/b/a Integretel ("Integretel"), The Billing Resource LLC, ("TBR"), Pacific Bell Telephone Company d/b/a AT&T Communications of California ("AT&T") and Verizon California, Inc. ("Verizon")[2] to issue refunds to

[1] Except as noted, all citations to Commission decisions are to the official pdf versions which are available on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

[2] Verizon California, Inc. is now Frontier California, Inc.

customers who were billed for unauthorized charges placed on their phone bills by OSP Communications LLC ("OSP") and impose penalties or other sanctions.[3]

On May 26, 2011, we issued Order Instituting Investigation (I.) 11-05-028 (or "OII") to determine if OSP and its alleged owner John Vogel ("Vogel") violated Public Utilities Code section 2890[4] or other rules or laws by placing unauthorized collect call charges on California consumers' telephone bills, a practice known as "cramming." The OII named OSP and Vogel as the respondents and named TBR and Integretel relief respondents. The OII instructed relief respondents "to place all monies in [their] possession related to any OSP charges in an interest earning escrow or trust account pending resolution of [the] investigation."[5] AT&T, Verizon, Capital, LLC, and CardinalPointe Capital Group were named interested parties to the proceeding.

On January 17, 2013, SED and respondents OSP and Vogel, filed a joint motion to adopt a settlement agreement. In the settlement, respondents deny allegations of cramming but agree, among other things, to disgorge all profits from alleged unauthorized charges to California consumers, to relinquish any claim or rights to monies held by OSP's billing agents, to make full reparation to California consumers for $5,700,000, and to pay a penalty of $2,785,400. AT&T and Verizon did not participate in mediation or the subsequent settlement discussions which resulted in this settlement.

On September 10, 2013, we issued D.13-09-001 approving the settlement agreement between SED, OSP, and Vogel. When we approved the settlement we were aware that Vogel had filed a voluntary petition for bankruptcy shortly after entering into the settlement with SED and that OSP had previously ceased operations. However, we

[3] SED subsequently settled with TRB and D.16-03-012 granted the joint motion of TBR and SED for approval of the settlement agreement ("TRB Settlement").

[4] Subsequent section references are to the Public Utilities Code, unless otherwise noted.

[5] TBR complied and placed approximately $1.1 million in an escrow account which represented all monies TBR had been holding in a reserve account for OSP-related charges as of approximately May 26, 2011. Integretel had filed a voluntary petition for a Chapter 11 Bankruptcy in 2007 and did not place any money into an escrow account.

kept the proceeding open solely "to determine the appropriate method for issuing refunds" that were ordered therein which included the method for issuing refunds of funds held by relief respondents. (D.13-09-001, p. 25 [Ordering Paragraph ("OP") 14] & Attachment A, p. 7, paragraph 41.)[6] With our adoption of the settlement, the OII issues were resolved.[7]

On February 2, 2015, SED filed a motion asking us to issue an OSC to relief respondents and AT&T and Verizon to show why they should not be ordered to issue the $5.7 million in customer refunds ordered in D.13-09-001 and why penalties or other sanction should not be imposed. SED argued that the OSC was necessary because it appeared that the respondents did not have resources to effectuate any of the refunds ordered in D.13-09-001.

On October 30, 2015, SED and relief respondent TBR filed a motion to adopt the TBR settlement. Pursuant to the TBR settlement, TBR would disburse approximately one-third of the $1.1 million held in escrow to the Commission for refund to California consumers billed for alleged unauthorized charges by OSP.[8]

On March 17, 2016, we issued D.16-03-012, which granted SED and TBR's motion to approve the TBR Settlement[9] and denied SED's motion for an OSC against AT&T and Verizon (sometimes referred to "billing telephone companies").

SED filed an application for rehearing of D.16-03-012 challenging only our denial of its motion requesting an OSC. (Rehg. App., p. 1.) In its rehearing application, SED contend that we committed legal error by misinterpreting the legal standard for

---

[6] Attachment A is the approved settlement between SED, OSP and Vogel.

[7] The settlement stated: "This Agreement represents a full and final resolution of the issues set forth in the OII, and the matters giving rise thereto, including, but not limited to, all potential claims, penalties, enforcement actions or investigations. (D.13-09-001, Attachment A, p. 9.)

[8] The $1.1 million comprised payments from customers nationwide who were billed for OSP charges. Approximately one-third of this amount was collected from California customers.

[9] While D.16-03-012 adopted the settlement, it mistakenly did not include an ordering paragraph doing so. This decision modifies D.16-03-012 to add such ordering paragraph.

billing telephone company liability and that Finding of Fact 3 is erroneous and not supported by the record evidence. (Rehg. App., pp. 1-2.) AT&T and Verizon each filed a response opposing the rehearing application.

We have carefully considered the arguments SED raises in its application for rehearing and do not find grounds for granting rehearing. We modify D.16-03-012 to add and modify an ordering paragraph, to delete unnecessary dicta and to add further discussion, findings of fact and conclusions of law to clarify our denial of SED's motion. Rehearing of D.16-03-012, as modified, is denied.

II. DISCUSSION

1. D.16-03-012 did not deny SED's motion based on billing telephone company liability under section 2890.

SED contends that D.16-03-012 errs by misinterpreting the legal standard for billing telephone company liability. (Rehg. App., pp. 1-2.) SED contends that billing telephone companies are strictly liable for unauthorized charges under section 2890(a) which states that "[a] telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized." (Rehg. App., pp. 7-8.) SED argues that D.16-03-012 wrongly concludes that billing telephone companies only became strictly liable for refunding all unauthorized charges, including those for which no refund was requested, in 2010 with our adoption of Rule 10 in D.10-10-034. (Rehg. App., p. 7.) SED contends that D.16-03-012 ignores Commission precedent interpreting billing telephone company liability under the statute, citing to D.14-08-033.[10] (Rehg. App., pp. 10.)

While D.16-03-012 contains some discussion of billing telephone company liability pursuant to section 2890, it does not reject SED's motion based upon this interpretation. As discussed in D.16-03-012, we rejected SED's motion because

[10] *Decision Different to Modified Presiding Officer's Decision Finding that Corporate Respondents and Patrick Hines Placed Unauthorized Charges on California Telephone Bills and Closing the Proceeding* [D.14-08-033] (2014).

cramming had not been admitted or proven against any respondent. (D.16-03-012, p. 17 [Finding of Fact ("FOF") 3].) Because this discussion of billing telephone company liability is dicta and the decision contains no findings of fact or conclusions of law on this issue, we delete this discussion in the ordering paragraphs below. However, we believe that D.16-03-012 would benefit from additional clarification on why we choose to deny SED's motion in this instance.

In its motion, SED asked us to issue an OSC to as to why the billing telephone companies should not be held liable for $5.7 million in customer refunds we ordered in D.13-09-001. However, this was not a litigated finding of cramming but resulted from a settlement with the respondents. The OII respondents settled this case without any admission of cramming and specifically denied engaging in any unfair, fraudulent or unlawful business practices. AT&T and Verizon did not participate in the mediation or subsequent settlement discussion that resulted in this settlement.

Moreover, as discussed above, we did not name AT&T and Verizon as respondents in the OII although SED is relying on the same staff report to now seek liability. The scoping memo also did not include addressing the billing telephone companies' liability for allegations of cramming against OSP. When we adopted the settlement in D.13-09-001, our OII issues were resolved and under normal circumstances the proceeding would have been closed.[11] In this case, we kept the proceeding open for the sole purpose of determining "the appropriate method for issuing refunds" which included the method for issuing refunds of funds held by the relief respondents. (D.13-09-001, p. 25 OP 14 & Attachment A, p. 7, paragraph 41.[12]) We did not, as SED argues, keep the proceeding open to determine how to secure funds for refunds.

[11] The adopted settlement states the "agreement represents a full and final resolution of the issues set forth in the OII, and the matters giving rise thereto, including, but not limited to, *all* potential claims, penalties, enforcement actions, or investigations." (D.13-09-001, Attachment A, p. 9, emphasis added.)

[12] The adopted settlement states: "the parties acknowledge that the Commission will determine the appropriate method for issuing refunds held by Integretel and TBR to California consumers at a later time in this proceeding."

Given these circumstances, we denied SED's motion. Should SED determine an OSC of AT&T and Verizon is still warranted given all of the circumstances in this case, it may present its case to us and we can considered whether a new proceeding is warranted. We modify D.16-03-012 in the ordering paragraphs below to better explain our reason for denial.

2. Finding of Fact 3 is not erroneous.

SED contends that Finding of Fact 3 is erroneous and not supported by the record evidence. (Rehg. App., pp. 10-12.) Finding of Fact 3 states: "Cramming of customer telephone bills has neither been admitted by nor proven against any respondent in this proceeding."

SED contends that it proved by a preponderance of the evidence that OSP's collect call charges could not have been authorized. (Rehg. App., p. 11.) SED argues that it made a prima facie showing of cramming in its staff report. (Rehg. App., p. 2.) SED contends that the fact that the case was settled with OSP without an admission of guilt has no bearing on the unrefuted evidence it presented which demonstrated that OSP collect calls were not authorized.

SED is not correct. In this case there was no admission of or proof of cramming. The OSP settlement denied the cramming allegations. While SED's report established a prima facie case which absent contradictory evidence would have been sufficient to establish cramming had the case been litigated, the case was settled without admission of unlawful behavior.[13]

SED contends that various admissions support a finding that OSP's charges are unauthorized. (Rehg. App., pp. 11.) SED is not correct. The language SED cites

[13] The adopted settlement states: "Respondents … do not admit any issue of law or fact alleged in the OII" and "Respondents deny engaging in unfair, fraudulent, or unlawful business practices [and] [w]ithout admitting fault, . . . recognized that erroneous charges may have been billed." The (D. 13-09-001, Attachment A, p. 5.)

demonstrates only that OSP stated that customers "may have been erroneously charged." In the settlement, OSP denies the cramming allegations.

SED contends that the charges were unauthorized because OSP agreed to disgorge and refund all OSP-related charges and to pay penalties for "erroneous billings." (Rehg. App., p. 11.) Yet the settlement itself states that any payments in connection with the settlement shall not be construed as an admission of liability or guilt. (D.13-09-001, Attachment A, p. 6.)

SED contends that we acknowledged that customers were crammed by OSP when we stated in D.13-09-001 that the settlement terms provided net public benefit by achieving a partial recovery for ratepayers. (Rehg. App., pp. 11-12.) SED is not correct. D.13-09-001 contains no litigated finding that cramming has taken place and the settlement denies any occurred.

SED also contends that because OSP's billing agent, TBR admits that it does not have evidence to refute SED's allegations, cramming has occurred. (Rehg. App., p. 11.) SED and TBR's stipulation of facts as part of a settlement agreement does not create an evidentiary fact of cramming.

While SED's report established evidence sufficient to open an OII, the report alone does not establish that cramming has occurred when the case is settled without any admission of fault. Thus, Finding of Fact 3 is not erroneous and is supported by the record.

3. Request for oral argument should be denied.

SED requests oral argument pursuant to rule 16.3 of our Rules of Practice and Procedure. SED states that oral argument is necessary because D.16-03-012 creates new precedent for cramming enforcement matters by limiting actions against billing telephone companies to charges occurring after 2010. (Rehg. App., p. 12.)

The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. (See rule 16.3(a); Cal. Code of Regs., tit. § 20, 16.3, subd. (a).) Here, oral argument is unnecessary because we delete the dicta in D.16-03-012 to which SED took issue.

III. CONCLUSION

As discussed above, we modify D.16-03-012 to add and modify an ordering paragraph, to delete the dicta on billing telephone company liability and to add additional discussion and findings of fact and conclusions of law on the denial of SED's motion. Rehearing of D.16-03-012, as modified, is denied as no legal error has been shown.

THEREFORE IT IS ORDERED that:

1. D.16-03-012 is modified as follows:

a. Replace the last paragraph starting on page 8 and continuing to page 9 with the following:

We deny SED's motion to initiate a new OSC, in this proceeding, against the AT&T and Verizon to hold them joint and severally liable for the refunds ordered in D.13-09-001. We did not name AT&T and Verizon as respondents in the OII although SED is now asking us to rely on the same staff report to now seek liability. The scoping memo also did not include addressing the billing telephone companies' liability for allegations of cramming against OSP. The OII respondents settled this case without any admission of cramming and specifically denied engaging in any unfair, fraudulent of unlawful businesses practices. When we adopted the settlement in D.13-09-001, our OII issues were resolved and under normal circumstances the proceeding would have been closed. In this case, we kept the proceeding open for the sole purpose of determining "the appropriate method for issuing refunds" which included the method for issuing refunds of funds held by the relief respondents. (D.13-09-001, p. 25 OP 14 & Attachment A, p. 7, paragraph 41.)

Our denial of SED's motion does not preclude SED from preparing an OSC regarding AT&T and Verizon's liability and responsibility for refunds as well as penalties. Should SED determine an OSC of AT&T and Verizon is still warranted given all of the circumstances in this case and any additional facts specifically related to AT&T and Verizon, SED may present a new report and OII to us for consideration.

b. Page 13, replace the third sentence in the fifth full paragraph with the following:

In its comments, SED objects to the PD on various grounds. The issues raised in these comments have been discussed in the text above as necessary.

c. Delete from the fourth line from the bottom of page 14 though the end of section 5 on page 16.

d. Page 17, Finding of Fact 3, replace "Cramming" with "Under the Settlement adopted in D.13-09-011 and the TBR Settlement adopted in this decision, cramming".

e. Page 17, add the following as Finding of Fact 4:

   The subject of AT&T and Verizon's liability was not an issue in I.11-05-028 or in the Scoping Memorandum issued in this proceeding.

f. Page 17, add the following as Finding of Fact 5:

   The issue of AT&T and Verizon's liability was not addressed in the settlement adopted in D.13-09-011 or the TBR Settlement adopted in this decision.

g. Page 17, Conclusion of Law 1 is renumbered as Conclusion of Law 3.

h. Page 17, Conclusion of Law 4 is renumbered as Conclusion of Law 1.

i. Page 17, replace Conclusion of Law 2 with the following:
   With the adoption of the settlement in D.13-09-011, the issues in the OII were resolved except for the method of distributing refunds which included refunds of monies held in escrow by TRB.

j. Page 17, replace Conclusion of Law 3 with the following:

   It is reasonable to deny SED's motion to initiate an OSC against AT&T and Verizon in this proceeding

k. Page 17, Ordering Paragraph 1, add the words "without prejudice" to the end of the sentence.

l. Page 17, Ordering Paragraph 2 is modified to read:

The Settlement Agreement, included as Attachment A to this decision, is adopted.

2. Rehearing of D.16-03-012, as modified, is denied.

3. This proceeding, Investigation (I.) 11-05-028, is closed.

This order is effective today.

Dated ___________________ 2016, at San Francisco, California.